

November 13, 1998

to
BEAU FRIEDLANDER

Dear Beau,

I write in answer to your letter of November 4. I hope you'll forgive me if I sometimes delay a few days in answering your letters. I have so many things coming at me now that I can't keep up with them all. Legal matters have to take priority, since it's possible I may have to file the §2255 motion by January 22.

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Please do refrain from discussing the draft of the §2255 motion with anyone. I agree completely with all of the comments you made in the fifth, sixth, and seventh paragraphs of your letter, except possibly your opinion about the use of "(Mis) Represented." I also agree with the first part of the eighth paragraph of your letter, through the words, "I would strike this sentence completely." Mello himself has indicated to me that he thinks the draft needs considerable rewriting. I want to have it rewritten radically, whether I ~~have to~~ do the job myself or get a lawyer to do it for me.

I disagree with the latter part of your eighth paragraph, and your ninth paragraph. Because of the knowledge and experience that lawyers have, and which I do not have, I want to get a lawyer to represent me on this issue if at all possible, and my chances will be very much better with a lawyer than if I ~~prosec~~ proceed pro se. Though the §2255 motion will be a public document,

its purpose is not to address the public but to win a legal point for me, and winning the legal point has to take precedence over any consideration of communicating with the public. Hence, decisions about footnotes should be made by a lawyer — if I can get one to represent me.

I agree that the timing of the publication of Truth versus Lies may be important, but I personally have no opinion on this matter, since I am experienced neither in the publishing business nor in the law, hence have no way of judging what would be the effect of publishing before or after the motion is filed. At present I don't even know whether the motion will be filed a little before January 22 or a little before May 4. I am in communication with a distinguished lawyer who I hope will agree to represent me on the § 2255 issue, and he has advised me to wait until I have secured representation and decided on a legal strategy before doing anything about communicating with the public. With luck, I should be able to resolve fairly soon the question of who will represent me, and then I'll be able to discuss with my lawyer the timing of the publication of the book.

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Our big problem now is the copyright issue. Obviously I can't ask you to risk major financial loss through having to defend yourself against a lawsuit, or as a result of an injunction that would prevent you from distributing books that

you've already had printed. On the other hand, my brother's and my mother's letters provide some of the strongest evidence that I present in the book, so I want to retain as much of that material as I possibly can, and paraphrase or summarize only where it is really necessary in order to avoid exposing you to risk. Ideally I would like to have a top-notch copyright lawyer review the book and tell us just what has to be deleted and replaced by a paraphrase or summary in order to protect you. I don't know whether your lawyer specializes in copyright or how good he is, and even if he's among the best copyright lawyers there's no harm in getting a second opinion, so I asked Mello to refer me to a copyright lawyer at Vermont Law School who might be willing to advise me pro bono about our problem. Mello suggested a Professor Oliver Goodenough; I wrote to him just a couple of days ago, so we'll see what, if anything, he has to say.

I'm also writing to my erstwhile attorneys Denvir and Clarke, ~~and~~ asking them whether they can find a copyright attorney willing to advise me pro bono. Denvir and Clarke of course have good connections in the legal world, and it's possible that they may be able to get me a top-notch copyright attorney.

Perhaps the David Eiseman whom I mention below.

Now, the attorney ~~with whom~~ on my defense team with whom I discussed the copyright problem in the early months of 1997 (when I was just
 ... to the book) was Garu Sowards. At

that time I urged Sowards to try to persuade my brother to turn over to me the copyright to his letters. For reasons that it would take too long to explain here, I believed that at that stage we would have had a good chance of persuading ~~me~~ my brother to give me the copyright, but ^{that it} ~~to do so.~~ might later become much more difficult. For reasons that still are not clear to me, Sowards was reluctant to approach my brother on this subject. Instead he got in touch with a friend of his named David Eiseman, who according to Sowards was an excellent copyright lawyer. Eiseman provided Sowards with some materials that he (Sowards) brought to me and by means of which he persuaded me that there should be no copyright problem involved in publishing my brother's letters in my book.

I should have studied those materials much more carefully than I did at the time. I've since learned that Sowards is a slippery character who apparently has no hesitation about lying to clients. I don't know whether he was being consciously dishonest with me on the copyright issue, but it now appears that the problem is much more difficult than he represented it to be.

Through the offices of Judy Clarke I've now obtained from Sowards a copy of the same (or similar) materials that he showed me ~~me~~ early in 1997, and I find that, perhaps as a result of having read the material carefully (I was

preoccupied with other matters at the time), I misunderstood a crucial point. I told you in an earlier letter that I thought I had the right to publish my brother's letters in order to defend my reputation. But I now find that what the law actually says is that one has the right to republish a published ^{document} ~~material~~ in which one has been defamed, as part of an effort to defend oneself against the defamation. The material I have says nothing about publishing a different document by the person who has defamed one, as part of an effort to defend oneself against the defamation.

So here's where that leaves us: As far as I can make out from the ^{good} materials I have, I imagine we could make a ~~strong~~ case that publication of most of the extracts that appear in the book would constitute fair use, given that the purpose of publishing the material is to prove that my brother has lied about me and to show his motives for doing so. However, the "fair use" concept is very vaguely defined, and we might lose the case on a fair-use defense just as easily as we might win it.

I can see two other grounds on which we could defend ~~against~~ against a suit for copyright infringement. In the first place, any such suit has to be based on actual or potential loss of profit to the holder of the copyright. We could argue that my brother could have made no profit from his letters anyway, since ^{they} are of no interest to the

public except as part of ~~the~~ a work like Truth versus Lies. But I imagine that would be a weak argument.

The second ground appears to me to be very much stronger. I quote the memorandum from David Eiseman, pp. 1, 2:

"Copyright protection for a letter extends only to the portions of the letter deemed 'expression,' because the portions display the author's originality. ... In contrast, copyright protection does not extend to any ideas or facts contained in a letter. ... Based ~~on~~ upon these principles, one court has held that the author of certain letters did not hold a copyright in those portions of the letters that reflected the author's 'thoughts and feelings'"

So it looks to me as if the greater part of the material that I've quoted from my brother's letters is not even covered by copyright. Needless to say, it's not for amateurs like you and me to decide which parts of the letters are covered by copyright and which are not, or how much of the material that is covered by copyright can be reproduced under the "fair-use" doctrine. That's why I'd like to have a top-notch copyright lawyer go over the book and tell us what we can safely use and what we can't.

For your convenience, I'm sending you under separate cover a copy of the material on copyright that my lawyers have sent me.

Now here's what I suggest we do:

First we get one or more good copyright lawyers to review the book and tell us what parts cannot safely be printed without permission of the copyright holders.

Second, we get permission from the owners of copyrighted material other than that produced by my brother and mother. We delay as long as may be practicable before approaching my brother and mother, because when my brother finds out about what is going to be published he may cause problems — for example, he may go to the media and try to discredit the book in advance.

Third, when the time is ripe, we approach my mother and ask permission to publish the extracts from her letters. I think we will have a good chance of getting her permission if we approach her in the right way and without my brother's knowledge. I think we will have a very much better chance of getting her permission if you approach her rather than I. But, since everything will depend on approaching her in the right way, you should get some advice from me, before you approach her, about her psychology and about how to deal with her.

Fourth, after we've dealt with my mother, we ~~approach~~ approach my brother for his permission with regard to those materials that we can't safely publish without his permission. He probably will not give his permission, but we should ask him for it anyway, because then we can state

P.S. A neighbor has just sent me a fine photo of Baldy Mtn., at the foot of which I lived in Montana. I imagine she'd give permission for its use in the book. Please let me know if you're interested in photos of this type. If you are, I'll send it to you. } 8.

in the book that such-and-such materials have been summarized or paraphrased because my brother has denied permission for their publication. This will help show readers that my brother has something to hide.

By the way, I don't think we would have to worry very much about a suit for copyright infringement brought by my brother. Our main problem would be that he might try to get an injunction to prevent the book from being distributed in the first place. I don't think he will be interested in monetary compensation or in retaliation for copyright infringement; his main concern will be to avoid being discredited, hence he will want to impede publication of the book rather than retaliate after it's been published.

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I've been so busy with important correspondence that I haven't even begun to read Mello's book, but I've read the Foreword to it that Gary Greenberg has written, and I think it's excellent. Greenberg does a splendid job of exposing the ideological basis of the shrinks' diagnoses of me. For the sake of the Foreword alone I hope Mello's book will be published. Mello has at least one hot prospect other than Context, though, and I don't know which publisher he will choose in the end.

I hope you'll pardon the messiness of this letter. It's a first draft, and I just don't have time to rewrite it.

Best regards,